No. 6447

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GWYNETH HELBUSH,
Appellant,

vs.

HERMAN H. HELBUSH,
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

This case comes to this Court on appeal from a judgment of dismissal made and entered in the Central Division of the United States District Court in and for the Southern Division of California. The appellant there filed her Bill of Complaint in Equity in which she alleged that she and appellee intermarried in the State of California on the 9th day of March, 1923, that on the 14th day of January, 1924, appellee deserted her and she thereupon commenced an action for divorce in the Superior Court of the State of California in and for the City and County of San Francisco. Thereafter, on the 27th day of June, 1924, the interlocutory decree of said Superior Court was entered in favor of the appellant adjudging she was entitled to a divorce from appellee on the ground

of extreme cruelty. Appellant avers that she condoned the offense specified in the interlocutory decree and that the parties resumed marital relations until January 3, 1929, when appellee again wilfully deserted appellant. Appellant asserts that on the 10th day of April, 1929, appellee obtained ex parte, and without the knowledge or consent of appellant, and without notice to her, a final decree of divorce in said action. Thereafter appellant moved the Superior Court to set aside and vacate said decree of divorce and her motion was denied. From this ruling of the Superior Court she appealed to the Supreme Court of California and on the 15th day of July, 1930, the Supreme Court affirmed the order of the Superior Court. The appellant asked for a rehearing from the Supreme Court which was denied. The appellant claims she was denied due process of law under the Fourteenth Amendment of the Constitution of the United States. She pleads in her Bill in Equity that each of the jurisdictional, constitutional objections relied upon by her were urged before the said Superior Court on motion to vacate the final decree and before the Supreme Court of the State of California on the appeal. Appellant alleges that section 132 of the Civil Code of California is in violation of the due process of law clause of the Fourteenth Amendment of the Constitution of the United States, and prays that the final decree of divorce be declared void. We are aided in the relation of the marital troubles and the litigation of the parties by the opinion of the Supreme Court of the State of California in *Helbush v. Helbush,* 209 Cal. 758.

ARGUMENT.

The appellant to justify her application to the United States District Court, of necessity appeals to the Federal constitution and asserts she has been denied, under the Fourteenth Amendment by the Courts of the State of California, due process of law. What in reality she seeks is that the Federal Court shall interpose its strong arm as a court of error and appeals to revise decisions of the various courts of the State. She desires in a matter of procedure rather than one of jurisdiction to control the action of the State; and she seeks, as we think we shall demonstrate, after ample opportunity has been accorded her in the Courts of this State, to have their adverse decisions in matters wholly within the right of the State to determine, overruled now by a Federal tribunal. Efforts of this sort have not been uncommon, and the unbroken denial of them has made very clear the law upon the subject. It shall be our purpose to demonstrate this. But first very briefly is presented the California Courts' construction and interpretation of the sections of the Civil Code assailed by appellant.

I.

THE RIGHTS OF THE PARTIES HAVE BEEN FULLY LITIGATED AND FINALLY DISPOSED OF BY THE COURTS OF THE STATE OF CALIFORNIA.

Helbush v. Helbush, 209 Cal. 758.

The decision, although it is unnecessary upon this hearing to advert to questions of fact, very emphatically answers some of the allegations of appellant's

bill. It is there said, in affirming the decision of the Superior Court denying appellant's motion to set aside the decree of divorce:

> "On the hearing of the motion numerous affidavits and counter-affidavits were filed. The affidavits on behalf of the defendant, which the court had the right to believe, disclosed a course of immorality, dissipation and deception on the part of the plaintiff before and after the marriage of the parties and until their separation, January, 1929. It is unnecessary to engage in a recital of the sordid narrative of these affidavits. It is enough to say that the showing made on said hearing was not such as to move the conscience of the chancellor on behalf of the plaintiff, but on the contrary disclosed that the purpose of the plaintiff in seeking a reconciliation was not sincere nor in good faith and was made for the purpose of benefiting herself monetarily at the defendant's expense. We find no abuse of the court's discretion in denying the motion and the order must stand unless it be determined that the court had no power to enter, or committed reversible error in entering, the final decree in the absence of the affidavit required by rule of court."

The Supreme Court thereupon held the lower Court had the power, the jurisdiction, to enter the decree, and affirmed the judgment. It appears from the opinion, too, that the plaintiff had endeavored to set aside the interlocutory decree of divorce and her motion had been denied, and that on the day following the granting of the final decree appellant filed a notice of motion to set aside that final decree and upon this motion there was a full hearing. After the motion

had been denied, appellant appealed to the Supreme Court of the State where again she was defeated.

It will be observed thus that there was opportunity for hearing and full hearing in every phase desired by appellant and after opportunity for hearing and full hearing, a decision by the trial Court, and, upon appeal, a decision by the Supreme Court. These decisions she now seeks to reverse by a decision of the Federal Court.

II.

THE SECTIONS OF THE CIVIL CODE OF CALIFORNIA ATTACKED BY THE BILL HERE HAVE BEEN UPHELD BY THE COURTS OF THE STATE.

Sections 131 and 132 of the Civil Code of the State of California were approved March 2, 1903, and their constitutionality at once questioned. They were held to be constitutional in

Deyoe v. Superior Court, 140 Cal. 476.

It will be observed that Section 132 provides:

> "When one year has expired after the entry of such interlocutory judgment, *the Court on motion of either party, or upon its own motion,* may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons and permit either to marry after the entry thereof; and such other and further relief as may be necessary to complete disposition of the action, but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has

been finally disposed of, nor then if the motion has been granted or judgment reversed," etc. (Italics ours.)

Section 131 of the Civil Code of California provides:

"In actions for divorce the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce. After the entry of the interlocutory judgment neither party shall have the right to dismiss the action without the consent of the other."

In the decision of *Helbush v. Helbush* by the Supreme Court of the State of California it is stated that a motion was regularly made by the appellant to set aside the interlocutory decree and this motion was then denied. Obviously no appeal was taken either from the interlocutory decree itself or from the motion denying the application to set it aside.

An interlocutory decree, after the time for appeal has expired, becomes final.

In *Reed v. Reed,* 9 Cal. App. 752, it is said:

"In our opinion the legislature contemplated that the interlocutory decree should settle the question as to whether or not a divorce should be granted, and the question of the disposition of the property rights properly before the court, for the

reason that provision is made as in other cases for a new trial, for an appeal within six months with like effect as if the judgment were final."

And in the conclusion of the opinion we find, in referring to *Claudius v. Melvin,* this language:

"The court said in the latter case 'The judgment entered on September 4, 1903, therefore, constituted a valid interlocutory judgment, declaring the plaintiff entitled to a divorce. As such it was subject to be vacated on appeal or on motion for a new trial or by proceedings under Section 473 of the Code of Civil Procedure. The time for all of these proceedings having expired, and no such proceeding to vacate it having been instituted, the court thereupon lost all power by any proceeding in the case to modify or vacate the judgment so far as it constituted an interlocutory judgment.' "

Yet again the Appellate Court of California has said:

"It has been determined that in a divorce action under the provisions of our Code the function of an interlocutory decree includes not only the establishment of the right of the party to a divorce but includes, also, the hearing and final determination of the rights of the parties as to property. Any disposition of property rights made in connection with the hearing of the principal cause of action is regularly included in and becomes a part of the interlocutory decree. If no appeal be taken, such decree becomes final with respect to the property rights as well as with respect to the adjudged right to a divorce."

Newell v. Superior Court, 27 Cal. App. 344.

It has been so definitely determined in California that an interlocutory decree is final unless appealed from, and that a final decree may be entered upon motion of either party, that other citations would be a mere waste of the Court's time. The rule with the authorities may be found stated in

9 *Cal. Jur.*, 762,766.

We find, therefore, from the undisputed facts that an interlocutory decree of divorce settling all the rights of the parties was duly made and entered; that subsequently before the Court rendering this interlocutory decree a motion was made by appellant to set it aside and this motion was denied; that the interlocutory decree became final; that a judgment of divorce based thereon and in accordance therewith was duly made by the Court rendering the interlocutory decree; that the day following this judgment appellant moved to set the same aside; that there was full hearing and full opportunity to be heard on said motion; that the motion was denied after full hearing by the trial Court; that appellant thereupon appealed to the Supreme Court of the State from the order denying her motion; that after full hearing before the Supreme Court, the judgment of the Superior Court was affirmed. The mere statement of these facts is the refutation of appellant's claim she has been denied due process of law.

III.

CONCEDING FOR THE SAKE OF THE ARGUMENT THE CLAIM OF APPELLANT AS TO LACK OF OPPORTUNITY TO BE HEARD IN THE FIRST INSTANCE UPON THE ENTRY OF THE FINAL DECREE OF DIVORCE, HER MOTION TO SET THE DECREE ASIDE AND THE SUBSEQUENT FULL OPPORTUNITY FOR HEARING AND APPEAL BY HER ARE CONCLUSIVE.

Of course, it cannot be for an instant conceded that any constitutional question arises from the entry of the final decree of divorce upon the motion of appellee. The procedure was that authorized by California, interpreted, construed and approved by the California Courts. But even if there were any merit whatsoever in the position assumed by appellant, which, of course, there is not, the motion immediately thereafter made by her to set aside the final decree, the full opportunity accorded her upon that motion, the evidence taken and the hearing had, the judgment of the trial Court thereafter, her appeal to the Supreme Court and its judgment, conserved every legal right she had and removed the case from the imaginative realm of a constitutional deprivation.

This has been decided by the Supreme Court of California in

Thomas v. San Diego College Co., 111 Cal. 365,

where it is said:

> "But it is contended that the first order was granted upon the ex parte application of defendant Stough, and that plaintiffs have not consented to or ratified the order. Whether the court erred in granting the order without notice need not be considered, as plaintiffs were heard upon the mo-

tion to recall the order or to stay its execution; and if their motion was properly denied, they were not prejudiced by the first order."

See, also, with a discussion of the subject:

Kilpatrick v. Horton, 89 Pac. 1035;
Balfe v. Rumsey Co., 133 Pac. 417;
Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 59 L. Ed. 220.

Of course, in the case at bar there was no jurisdictional defect, but the few cases above are cited from the long unbroken line, to demonstrate that even were there any such defect originally, it was wholly cured by the proceeding instituted by appellant upon which there was full hearing and determination.

IV.

DUE PROCESS.

Section 1 of Article IV of the Constitution of the United States invoked by appellant has been so often construed that no longer can there be the slightest doubt as to the general rules of interpretation. These we find to be:

1. The due process clause of the Constitution does not control mere forms of procedure in state courts or regulate practice therein.

2. If the essential elements of notice and of opportunity to defend are present, the United States Supreme Court will accept the interpretation given by the State Supreme Court as to the regularity under

a state statute of the practice pursued in a particular case.

3. Where a party has appeared and has been heard in a proceeding, there is no color for his contention that he has been deprived of his property without due process of law.

The Supreme Court of the State of California in a recent case expressed with clarity its view of the provision of the Federal Constitution here in question, as related to State proceedings, in this language:

> "(20-25). The contention is also advanced here that the action of the trial court in entering the judgment amounted to a denial of 'due process.' The contention is untenable. Due process of law is law in its regular administration through courts of justice, and means 'a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights' (Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565); 'and when secured by the law of the state the (federal) constitutional requirement is satisfied.' (Leeper v. Texas, 139 U. S. 462, 468, 11 S. Ct. 577, 579 (35 L. Ed. 225).) A state cannot be deemed guilty of a violation of the federal constitutional provision relating to due process because one of its courts, while acting within its jurisdiction, has made an erroneous decision. Arrowsmith v. Harmoning, 118 U. S. 194, 6 S. Ct. 1023, 30 L. Ed. 243. Any irregularities in procedure are matters for the consideration of the judicial tribunal within the state empowered by the law of the state to review and correct error committed by the courts. Iowa Cen-

tral Ry. Co. v. Iowa, 160 U. S. 389, 393, 16 S. Ct. 344, 40 L. Ed. 467. Due course of law under the state Constitution and due process of law under the Federal Constitution mean the same thing. Griggs v. Hansom, 86 Kan. 632, 634, 121 P. 1094, Ann. Cas. 1913C, 242, 52 L. R. A. (N. S.) 1161. It is the right of a litigant to have his cause tried and determined under the same rules of procedure that are applied to other similar cases, and when this is afforded to him he has no ground to complain the due process of law is not being observed. Estate of McPhee, 154 Cal. 385, 390, 97 P. 878. * * * The notice essential to due course and process of law is the original notice whereby the court acquires jurisdiction, and is not notice of the time when jurisdiction, already completely vested, will be exercised. The court having once acquired jurisdiction, 'however wrong the result of the proceeding may be, missteps occurring in the course of it constitute irregularities and errors in procedure only, and * * * cannot be conjured into anything graver by the use of impressive and high-sounding characterizations.' Griggs v. Hansom, supra: Cramer v. Farmers' State Bank, 98 Kan. 641, 158 P. 1111. Whether notice of subsequent proceedings, after the court has acquired jurisdiction by original process, will or will not be required is a matter of legislative discretion. After jurisdiction has attached, the party has no constitutional right to demand notice of further proceedings. Estate of McPhee, supra; Brown & Bennett v. Powers, 146 Iowa, 729, 732, 125 N. W. 833; Savage v. Walshe, 246 Mass. 170,184, 140 N. E. 787. If the defendant in the original action was entitled, by statute or rule of court, to notice of the entry of default

> and application for the judgment, want of such notice does not render the judgment void. Egan v. Sengpiel, 46 Wis. 703, 709, 1 N. W. 467."
>
> *Gray v. Hall,* 265 Pac. (Cal.) 252, 253.

It is submitted that the appellant has confounded what she believes to be an erroneous decision with a jurisdictional question. With her consent, jurisdiction was conferred on the Superior Court of the State of California to try her case. Jurisdiction vested in that Court, and an interlocutory decree, which she permitted to become final, was rendered. The Court never lost jurisdiction, however much she may assert it erred in its decision while exercising its jurisdiction. As stated in the opinion quoted, notice of subsequent proceedings after the Court has acquired jurisdiction will or will not be required as a legislative discretion may determine. But in this case we may go far beyond this, because of the full hearing accorded appellant in the motion to set aside the final decree of divorce upon many grounds.

The United States Supreme Court, in a case decisive of that at bar,

> *Rooker v. Fidelity Trust Co.,* 263 U. S. 413; 68 L. Ed. 362,

has said:

> "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court (the State court of Indiana) had jurisdiction of both the subject-matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the

> State on an appeal by the plaintiffs. 191 Ind. 141, 131 N. E. 769. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. * * * Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. Judicial Code, Sec. 237, as amended September 6, 1916, chap. 448, Sec. 2, 39 Stat. at L. 726, Comp. Stat. Sec. 1214, Fed. Stat. Anno. Supp. 1918, p. 411. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the district courts is strictly original. Judicial Code, Sec. 24. * * * Some parts of the bill speak of the judgment as given without jurisdiction and absolutely void; but this is merely mistaken characterization. A reading of the entire bill shows indubitably that there was full jurisdiction in the state courts, and that the bill, at best, is merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of that jurisdiction."

We might well paraphrase the language of the United States Supreme Court and say concerning the complaint in this case that it indubitably shows jurisdiction in the state court and that at best it is merely an attempt to get rid of the judgment for alleged

errors of law committed in the exercise of that jurisdiction.

We quote from a few of the leading cases of the United States Supreme Court.

> "Due process of law is process due according to the law of the land. The process in the States is regulated by the law of the State."
>
> *Walker v. Sauvinet,* 92 U. S. 90; 23 L. Ed. 678.

> "Due process of law is process according to the law of the land. This process in the states is regulated by the law of the state. * * * Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States exercised within the limits therein prescribed and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each state, which derives its authority from the inherent and reserve powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure."
>
> *Hurtado v. People of California,* 110 U. S. 516, 28 L. Ed. 232.

Again we find this emphatic declaration:

> "The Supreme Court of the State in a number of decisions has considered that section to mean that an heir is not a necessary party with the administrator. Cunningham v. Ashley, 45 Cal. 485;

> Bayly v. Muehe, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486; Finger v. McCaughey, 119 Cal. 59, 51 Pac. 13; Dickey v. Gibson, 121 Cal. 276, 53 Pac. 704. This is conceded by plaintiffs in error, but they say that because Para. 1582 of the Code of Civil Procedure 'is made the basis of the rule established by the Supreme Court of the State,' they complain of it, and respectfully urge that it 'is repugnant to the 14th Amendment of the Constitution of the United States, Sect. 1.' This is equivalent to saying that the legislative power of the state, being the source of the rights and the remedies, has so dealt with one as to make the other repugnant to the Constitution of the United States; or, if the complaint be of the decisions, that the Supreme Court of the State cannot construe the laws of the State and make of them a consistent system of jurisprudence, accommodating rights and remedies. Both contentions are so clearly untenable that further discussion is unnecessary."
>
> *McCaughey v. Lyall,* 224 U. S. 558, 564, 56 L. Ed. 883.

The State Court's decision is controlling is uniformly held by the United States Supreme Court. Thus we find it stated:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. * * * The questions presented, other than those relating to the validity of the state board's adjudication, all turned exclusively upon the law

of the state and the state court's decision of them is controlling."

Enterprise Irrig. District v. Farmers Mut. Canal Co., 243 U. S. 157, 166, 61 L. Ed. 644.

"The assignment (due process), however, has no substance in it. The parties to this action have been fully heard in the state court in the regular course of judicial proceedings, and in such a case the mere fact that state court reversed a former decision to the prejudice of one party does not take away his property without due process of law."

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382.

In an action where two judgments, one interlocutory and the other final had been rendered, the Court said:

"The case had been before the supreme court of the state on a prior appeal, and the court had then construed the trust agreement and dealt in a general way with the rights of the parties under it. Rooker v. Fidelity Trust Co., 185 Ind. 172, 109 N. W. 766. Referring to this, the plaintiffs, by way of asserting another ground for the writ of error, claim that, on the second appeal, the court took and applied a view of the trust agreement different from that taken and announced on the first appeal, and that this change in decision impaired the obligation of the agreement, contrary to the contract clause of the Constitution (118) of the United States, and was a violation of the due process and equal protection clauses of the 14th Amendment. Plainly, this claim does not bring the case within the writ of

error provision. Both decisions were in the same case. *The first was interlocutory* (185 Ind. 187, 188); *the second final. Concededly the case was properly before the court on the second appeal; the plaintiffs evidently thought so, for they took it there.* Whether the second decision followed or departed from the first, it was a judicial act, not legislative. The contract clause of the Constitution, as its words show, is directed against impairment by legislative action; not against a change in judicial decision. It has no bearing on the authority of an appellate court, when a case is brought before it a second time, to determine the effect to be given to the decision made when the case was first there."

Rooker v. Fidelity Trust Co., 261 U. S. 114, 67 L. Ed. 556.

The Federal Courts will not revise the decisions of State Courts, of course. In a recent case the Supreme Court held:

"Save in exceptional circumstances not now present we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common. 'The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.' Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 165, 166, 61 L. Ed. 644, 649, 37 Sup. Ct. Rep. 318."

American Railway Exp. Co. v. Kentucky, 273 U. S. 269, 71 L. Ed. 639.

The principle involved in the question of whether or not the Federal Constitution has been violated by the State Courts is most ably and succinctly stated in

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. Ed. 91,

where it is said:

> "If this court were to assume jurisdiction of this case, the question submitted for its decision would be not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the state has erred in its construction of the statute. As was said by this court, speaking by Mr. Justice Grier in such a case as long ago as 1847, 'It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary.' Commercial Bank of Cincinnati v. Buckingham, 46 U. S. 5 How. 317, 343 (12:169, 181); Lawler v. Walker, 55 U. S. 14 How. 149, 154 (14:364, 366).
>
> It was said by Mr. Justice Miller, in delivering a later judgment of this court: 'We are not authorized by the Judiciary Act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state could be brought here, where the party setting up a contract alleged that the court had

taken a different view of this obligation to that which he held.' Knox v. Exchange Bank, 79 U. S. 12 Wall. 379, 383 (20: 414, 415).

The same doctrine was stated by Mr. Justice Harlan, speaking for this court, as follows: 'The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which, in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but, in neither of such cases, would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state Constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question.' Lehigh Water Co. v. Gaston, 121 U. S. 388, 392 (30: 1059, 1060).

* * * When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States. Walker v. Sauvinet, 92 U. S. 90 (23; 678); Head v. Amoskeag Mfg. Co., 113 U. S. 9, 26 (28: 889. 895); Morley v. Lake Shore & M. S. R. Co., 146 U. S. 162, 171 (36: 925, 930); Bergemann v. Backer, 157 U. S. 655 (39: 845)."

The State always may provide its own method of procedure.

> "The state, keeping within constitutional limitations, may provide its own method of procedure and determine the methods and means by which such laws may be made effectual. The limit of the full control which the state has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution."
>
> *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 86, at 107, 53 L. Ed. 429.

A Massachusetts decision quoting the well known *Twining v. New Jersey* case, held:

> "(6) The statute here assailed is not violative of the due process clause of the Fourteenth Amendment. The governing principle was stated with affluent citation of supporting authorities in Twining v. New Jersey, 211 U. S. 78, at pages 110, 111, 29 S. Ct. 14, 24 (53 L. Ed. 97), in these words:
>
> 'Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, * * * and that there shall be notice and opportunity for hearing given the parties. * * * Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and

methods of trial, and held them to be consistent with due process of law.' ''

Vallavanti v. Armour & Co., 162 N. E. (Mass.) 690, 691.

It must be kept in mind that the constitutional provision is

"Nor shall any *state* deprive any person of property without due process of law."

If the *state* has provided a mode for the determination of specific questions and that mode is pursued by parties litigant, no constitutional question arises.

The language of the decision in

Arrowsmith v. Harmoning, 118 U. S. 196, 30 L. Ed. 243,

makes this very plain thus:

"The statute under which the court acted would, if followed, have furnished Arrowsmith all the protection which had been guaranteed to him by the Constitution of the United States. The bond in question was matter of procedure only; and if it ought to have been required, the court erred in ordering the sale without having first caused it to be filed and approved. At most, this was an error of judgment in the court. The constitutional provision is 'Nor shall any *State* deprive any person of life, liberty, or property without due process of law.' Certainly a State cannot be deemed guilty of a violation of this constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. The Legislature of a State performs its whole duty under the Con-

stitution in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the courts, and the parties are left to the appropriate remedies for the correction of errors in judicial proceedings."

See, also,

Savage v. Walshe (Mass.), 140 N. E. 787-792.

Two cases have recently been decided by the United States Supreme Court wherein very briefly the due process clause of the Constitution is construed.

Ohio ex rel. Bryant v. Akron, etc., 281 U. S. 74, 74 L. Ed. 710;

Dohany v. Rogers, 281 U. S. 362, 74 L. Ed. 904.

In the *Ohio* case Chief Justice Hughes, speaking for the Court said:

"As to the due process clause of the 14th Amendment it is sufficient to say that as frequently determined by this court the right of appeal is not essential to due process provided that due process has already been accorded in the tribunal of first instance." (Citing cases.)

"The opportunity afforded to litigants in Ohio to contest all constitutional and other questions fully in the common pleas court and again in the court of appeals plainly satisfied the requirement of the Federal Constitution in this respect, and the state was free to establish the limitation in question in relation to appeals to its Supreme Court in accordance with its views of state policy."

In the latter case Mr. Justice Stone, speaking for the Court said:

> "The due process clause does not guarantee to the citizen of a State any particular form or method of State procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense; due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."

In a case where a New York State Court appointed a receiver of a defendant husband's property based upon a decree for alimony rendered in New Jersey and the husband asserted that he was deprived of his property without due process of law, Mr. Justice Gray, speaking for the United States Supreme Court, said:

> "The husband, as the record shows, having appeared generally in answer to the petition for alimony in the court of chancery in New Jersey, the decree of that court for alimony was binding upon him. * * * The Court of New York having so ruled thereby deciding in favor of the full faith and credit claimed for that decree under the Constitution and laws of the United States its judgment on that question cannot be reviewed by this court on writ of error. The husband having appeared and been heard in the proceeding for alimony, there is no color for his present contention that he was deprived of his property without due process of law."
>
> *Lynde v. Lynde,* 181 U. S. 183, 45 L. Ed. 810.

Authorities of the character of those cited might be multiplied indefinitely. We have sought to refer only to a few leading cases which make very clear that no question of due process of law under the Federal Constitution arises here. We do not attempt a detailed exposition of the authorities cited in appellant's brief for the most casual reading of them demonstrates they do not touch the real point in issue here. For instance, it will be observed that in *Louisville & N. R. Co. v. Schmidt,* 177 U. S. 230, cited by appellant, Mr. Justice White commences his opinion with a statement of the law as follows:

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided, in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

In

Simon v. Craft, 182 U. S. 427,

cited by appellant, Mr. Justice White again says:

> "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form."

The United States cases cited by appellant have no application to the case at bar.

CONCLUSION.

The obvious attempt of the appellant to make of the Federal Court a Court of Appeal from the Supreme Court of the State of California, it is respectfully urged ought not to be countenanced. In the appropriate tribunals, the forum selected by appellant herself, the differences between her and her husband have been fully adjudicated, and the adjudication rests not alone upon the decision of one Court, but of substantially every Court of record in the State of California. The code provisions under which the appellant originally sought relief, and under which the Courts of California ultimately rendered their decisions, have established the rule of procedure in divorce cases. These were invoked by the appellant in the first instance, and by the appellee latterly exactly as the code sections provide, and they have been declared to be but the methods of procedure in divorce cases by the Courts of California, and their validity and constitutionality upheld. It is this situation which makes impossible appellant's bill in this Court.

Appellant in the Courts of the State of California has had her day. No step in even the procedure, but in one fashion or another, she has had full opportunity to be heard, and has been fully heard. Through each Court of the state the sordid case has dragged its length. In each Court there has been after full presentation, decision upon the merits and the law. To transmute the regular proceedings of the State Courts into a mere detail of review by the Federal Court would be a reproach to our jurisprudence.

It is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco,
October 17, 1931.

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